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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL MARCOCCIO, et al.,
PETITIONERS,

v.

DONNA CROSSMAN, et al.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI

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I

QUESTION PRESENTED

This is a civil rights case. Petitioners,[1] defendants below, made an offer of judgment in the amount of $26,000 pursuant to Rule 68 of the Federal Rules of Civil Procedure. Respondents[2] rejected the offer and subsequently obtained a verdict for $5,010. Petitioners moved under Rule 68 for an award of their post-offer costs, including attorney's fees. The district court, relying upon *Marek* v. *Chesny*, 473 U.S. 1, 105 S.Ct. 3012 (1985), held that petitioners were entitled to their post-offer attorney's fees as part of their Rule 68 costs because the underlying substantive law, 42 U.S.C. §§ 1983 and 1988, includes attorney's fees among the costs recoverable in the action. The court of appeals disagreed and reversed the fee award.

The question presented, then, is as follows: When a civil rights plaintiff rejects a Rule 68 offer and subsequently obtains a judgment less favorable than the offer, thus entitling the defendant to recover his post-offer "costs" from the plaintiff, do the defendant's recoverable "costs" under Rule 68 include his post-offer attorney's fees?

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[1] Michael Marcoccio, Robert McDonald, Timothy O'Brien, Leonard Wahl and Dennis Lambert. Petitioners are all officers in the Providence Police Department.

[2] Donna and Darryl Crossman, suing on behalf of themselves and their two minor children, Krista and Ian.

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI

Opinions Below

The opinions below are both reported under the caption *Crossman* v. *Marcoccio*. The opinion of the United States District Court for the District of Rhode Island is reported at 108 F.R.D. 433 (December 23, 1985); the opinion of the United States Court of Appeals for the First Circuit is reported at 806 F.2d 329 (December 9, 1986).

Jurisdiction

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). The judgment of the court of appeals was rendered on December 9, 1986.

Statutes and Rules Involved

42 U.S.C. § 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988, in pertinent part: In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 U.S.C. §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Rule 68 of the Federal Rules of Civil Procedure, in pertinent part: At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

Statement of the Case

Respondents brought this action under 42 U.S.C. § 1983 against five police officers (petitioners here), the Providence Police Department and the chief of police.[3] The complaint alleged that petitioners had entered respondents' home without probable cause and assaulted Donna and Darryl Crossman, falsely arrested and imprisoned them, and maliciously prosecuted them, all in violation of their constitutional rights. Simultaneously with their answer to the complaint, the named defendants filed a Rule 68 offer of judgment in the amount of $26,000, inclusive of all costs, interest and attorney's fees accrued to date.[4] Respondents rejected the offer.

The claims against the chief of police and the police department were dismissed by stipulation, and respondents' case against the individual police officers proceeded to trial. The jury returned a verdict in favor of the respondents against all five petitioners in the total amount of $5,010—nearly $21,000 less than the offer of judgment. Rule 68 provides that "[i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." Accordingly, petitioners filed a bill of costs, which included a request for $880.50 in post-offer taxable costs and $10,902.50 in post-offer attorney's fees.

Respondents opposed petitioners' bill of costs on two grounds. First, they argued that Rule 68 did not entitle petitioners to recover their post-offer costs, but merely operated to deny respondents recovery of their own post-offer costs—to which, as the prevailing parties, respondents would otherwise have been entitled under Rule 54(d).[5] Second, respondents argued that attorney's fees are not "costs" within the meaning of Rule 68.

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[3] Federal jurisdiction in the district court was based upon 28 U.S.C. §§ 1331 and 1343.

[4] It is undisputed that this was a valid offer under Rule 68; respondents raised no issue in the district court concerning the validity of the offer. 108 F.R.D. at 434 n.1, App. at 24 n.1.

[5] As the court of appeals subsequently put it, the question thus raised by respondents was "whether Rule 68 *reverses* the operation of Rule 54(d), or merely *cancels* it." 806 F.2d at 331, App. at 15.

On the first point, the district court found that "the overwhelming weight of authority supports the imposition of a defendant's costs on a plaintiff who rejects an Offer of Judgment and then recovers a less favorable judgment at trial," and accordingly held that petitioners were entitled to recover their post-offer costs. 108 F.R.D. at 435, App. at 26.

On the second point, the district court turned for guidance to *Marek* v. *Chesny*, 473 U.S. 1, 105 S.Ct. 3012 (1985).[6] In *Marek* this Court squarely held that in an action brought, like this one, pursuant to 42 U.S.C. § 1983, the term "costs" in Rule 68 includes attorney's fees awardable under 42 U.S.C. § 1988. The plaintiff in *Marek* had recovered $60,000 on his civil rights claim; however, he had previously rejected a Rule 68 offer of $100,000. He then moved for an award of attorney's fees—to which, as a prevailing plaintiff, he would ordinarily have been entitled under § 1988. The plaintiff argued that his post-offer "costs," which he could not recover because of Rule 68, did not include his post-offer attorney's fees. This Court did not agree. After reviewing the many federal statutes that provide for an award of attorney's fees to the prevailing party "as part of the costs," and after noting the lack of any definition of the term "costs" in either Rule 68 itself or the advisory committee's notes, the Court concluded as follows (105 S.Ct. at 3017):

> In this setting, given the importance of "costs" to the Rule, it is very unlikely that this omission was mere oversight; on the contrary, the most reasonable inference is that the term "costs" in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority. In other words, all costs properly awardable in an action are to be considered

[6] Petitioners' counsel does not have access to a copy of volume 473 of the United States Reports advance sheets. Further citations to *Marek* in this petition will be to the decision as published in West's Supreme Court Reporter, 105 S.Ct. 3012.

> within the scope of Rule 68 "costs." Thus, absent Congressional expressions to the contrary, where the underlying statute defines "costs" to include attorney's fees, we are satisfied such costs are to be included as costs for purposes of Rule 68. [Citations omitted].
>
> Here, [plaintiff] sued under 42 U.S.C. § 1983. Pursuant to the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, a prevailing party in a § 1983 action may be awarded attorney's fees "as part of the costs." *Since Congress expressly included attorney's fees as "costs" available to a plaintiff in a § 1983 suit, such fees are subject to the cost-shifting provision of Rule 68.* [Emphasis added.]

The district court below correctly held that this case is controlled by *Marek*. 108 F.R.D. at 435-37, App. at 27-29. *Marek* holds that, in a § 1983 case, Rule 68 "costs" include attorney's fees. Respondents are liable under Rule 68 for petitioners' post-offer costs; therefore, they are liable for petitioners' post-offer attorney's fees, which are included "as part of the costs."

The court of appeals agreed that Rule 68 requires respondents to pay petitioners' post-offer costs,[7] but it rejected the inclusion of petitioners' post-offer attorney's fees as part of those costs. The court did not rule as it did because it objected to the logic of petitioners' position—to the contrary, the court termed that logic "appealing," 806 F.2d at 333, App. at 19. Rather, the court's decision was based on its view that petitioners' argument "distort[s] the law governing the relationship between Rule 68 and [42 U.S.C.] section 1988." *Id.*, App. at 19. In support of this view, the court laid great stress on two words in the *Marek* holding: " '[T]he term "costs" in Rule 68 was intended to refer to all costs *properly awardable* under the relevant substantive statute or other authority.' " *Id.*, App. at 19, *quoting Marek* v. *Chesny*, 105 S.Ct. at 3017 (emphasis added by the court of appeals).

[7] 806 F.2d at 331-33, App. at 14-18.

The court noted that petitioners' attorney's fees were not "properly awardable" under 42 U.S.C. § 1988 for two reasons. First, § 1988 awards fees only to a "prevailing party." 806 F.2d at 334, App. at 20. Second, under *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421 (1978), a civil rights defendant may not be awarded attorney's fees under § 1988 unless the trial court determines that the plaintiff's action was "frivolous, unreasonable, or without foundation"; inasmuch as respondents obtained a verdict in their favor, their case cannot be considered frivolous. "It follows from this," the court of appeals concluded, "that [petitioners'] attorney's fees were not 'properly awardable' costs as defined by section 1988 and, therefore, were not part of the costs shifted to [respondents] by the operation of Rule 68." 806 F.2d at 334, App. at 20.

Reasons Why the Writ Should Be Granted

I. The Decision of the Court of Appeals Conflicts With This Court's Decision in *Marek* v. *Chesny*.

This court held in *Marek* that "[t]he plain language of Rule 68 and § 1988 subjects [§ 1988 attorney's fees] to the cost-shifting provision of Rule 68." 105 S.Ct. at 3018. The "cost-shifting provision of Rule 68" has two parts: first, it denies to a prevailing plaintiff the recovery of his own post-offer costs; second, it requires a prevailing plaintiff to pay the defendant's post-offer costs. It defies logic and common sense to hold, as the court of appeals did, that § 1988 attorney's fees are included in the first half of Rule 68's "cost-shifting provision" but not in the second half, which the court acknowledged to be more important to the effectiveness of the rule. *See* 806 F.2d at 332, App. at 16-17.

"Rule 68 makes available to defendants a mechanism to encourage plaintiffs to settle burdensome lawsuits." *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 363 (1981) (Powell, J., concurring in the result). *Marek* holds that this "mechanism"

includes the shifting of attorney's fees, in addition to ordinary taxable costs, when the underlying statute includes attorney's fees among the recoverable costs. The district court in this case simply applied that holding as its logic clearly compels. Indeed, Justice Brennan dissented from the holding of *Marek* because, among other reasons, he believed that it would require "prevailing plaintiffs falling within Rule 68. . . to bear the defendant's post-offer attorney's fees." 105 S.Ct. at 3024 (Brennan, J., dissenting).

The court of appeals erred in refusing to follow the logic of *Marek* and relying instead upon its view of the relationship between Rule 68 and § 1988. In *Marek*, this Court found in the policies underlying § 1988 no expression of congressional intent to exempt the statute from the operation of the Rule. 105 S.Ct. at 3018. Thus, the court of appeals' rationale is flatly inconsistent with this Court's view of the relationship between Rule 68 and § 1988.

The only relevance of § 1988 in this case is that it makes attorney's fees part of the Rule 68 costs. The standards for fee awards under § 1988 are not imported into Rule 68, which, when it applies, is mandatory.[8] In *Marek*, this Court did not apply § 1988 standards to see if it might be "reasonable" to award the prevailing plaintiff a portion of his post-offer attorney's fees; rather, it applied the mandatory language of Rule 68, under which the plaintiff is not entitled to any post-offer fees. *Marek* v. *Chesny*, 105 S.Ct. at 3027-28 (Brennan, J., dissenting). The plaintiff's entitlement to fees in *Marek* was governed by Rule 68, not by § 1988; the same is true of petitioners' entitlement to fees in this case.

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[8] On the mandatory nature of Rule 68, *see, e.g.*, *Liberty Mutual Insurance Co.* v. *Equal Employment Opportunity Comm'n*, 691 F.2d 438, 442 (9th Cir. 1982).

Furthermore, contrary to the apparent belief of the court of appeals,[9] there is no conflict between Rule 68, as construed and applied by the district court in this case, and § 1988. As this Court said in *Marek*:

> Merely subjecting civil rights plaintiffs to the settlement provision of Rule 68 does not curtail their access to the courts, or significantly deter them from bringing suit. Application of Rule 68 will serve as a disincentive for the plaintiff's attorney to continue litigation after the defendant makes a settlement offer. There is no evidence, however, that Congress, in considering § 1988, had any thought that civil rights claims were to be any different from other civil claims insofar as settlement is concerned. . . .
>
> * * *
>
> Section 1988 encourages plaintiffs to bring meritorious civil rights suits; Rule 68 simply encourages settlements. There is nothing incompatible in these two objectives.

105 S.Ct. at 3017-18. In other words, there is no conflict between encouraging a civil rights plaintiff to bring suit initially by offering him attorney's fees if he wins, and encouraging ***both parties*** to settle after a civil rights suit is filed by shifting the defendant's attorney's fees to the plaintiff if the plaintiff fails to accept a reasonable settlement offer.

In short, petitioners submit that certiorari should be granted because the decision below is inconsistent with *Marek* and the court of appeals' rationale fails to justify that inconsistency.

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[9] "These two words — 'properly awardable' — are so essential to the holding of *Marek* that, even if the Supreme court had not expressly included them, *we would have implied their existence to prevent Marek's chilling effect on the initiation of civil rights actions from attaining glacial magnitude.*" 806 F.2d at 333, App. at 19-20 (emphasis added).

II. The Question Presented Is an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The precise question decided by the court of appeals in this case was not before this Court in *Marek*.[10] Now that it is squarely presented, petitioners respectfully submit that this Court should take the opportunity to decide it. As the court of appeals candidly acknowledged, Rule 68 is "among the most enigmatic of the Federal Rules of Civil Procedure because it offers imprecise guidance regarding which post-offer costs become the responsibility of the plaintiff." 806 F.2d at 331, App. at 14. The question presented in this case results directly from the "imprecise guidance" provided by Rule 68, as well as from the unclear nature of the relationship between Rule 68 and § 1988. It is, therefore, a question that requires definitive resolution by this Court.

The application of Rule 68 cost-shifting to § 1988 attorney's fees is a matter of sufficient importance to have already engaged this Court's attention in *Marek*. The importance of the specific question presented in this case is demonstrated by the amicus curiae briefs that were filed in the court of appeals: a joint brief by the American Civil Liberties Union and its Rhode Island affiliate urging reversal of the district court's decision, and a joint brief by the International Association of Police Chiefs, the National District Attorneys Association and others urging affirmance. Moreover, it is a question that will recur in the lower federal courts, with a high probability that conflicting decisions will result, until this Court puts it to rest.

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[10] The district court in *Marek* held (1) that Rule 68 prevented the prevailing plaintiff from recovering his post-offer attorney's fees, and (2) that Rule 68 did not entitle the defendants to recover their own post-offer costs, including attorney's fees. *Chesny* v. *Marek*, 547 F. Supp. 542, 547-48 (N.D. Ill. 1982). When the plaintiff appealed the former ruling to the court of appeals, the defendants did not cross-appeal the latter ruling. Consequently, when the case came before this Court on certiorari, the latter ruling was not presented for review. *Marek* v. *Chesny*, 105 S.Ct. at 3014 n.1.

Indeed, this has already occurred: in *Adams* v. *Wolff*, 110 F.R.D. 291, 293-94 (D. Nev. 1986), the court reached the opposite conclusion from the district court in this case. The district court's well-reasoned opinion in the instant case, though rejected by the court of appeals and therefore of no precedential value in the First Circuit, will undoubtedly —given the substantial sums of money at stake in fee-shifting cases—lead defendants to urge the same argument on district courts in other circuits.

Rule 68 serves an important policy: the settlement of litigation. "[P]arties to litigation and the public as a whole have an interest—often an overriding one—in settlement rather than exhaustion of protracted court proceedings." *Delta Airlines, Inc.* v. *August*, 450 U.S. at 363 (Powell, J., concurring in the result). That policy is impaired by the decision of the court of appeals and would be advanced by this Court's adoption of the district court's view. As the Court recognized in *Marek*, 105 S.Ct. at 318, encouraging civil rights defendants to make good settlement offers will enure to the benefit of civil rights plaintiffs:

> Some plaintiffs will receive compensation in settlement where, on trial, they might not have recovered, or would have recovered less than what was offered. And, even for those who would prevail at trial, settlement will provide them with compensation at an earlier date without the burdens, stress, and time of litigation. In short, settlements rather than litigation will serve the interests of plaintiffs as well as defendants.

In summary, petitioners submit that certiorari should be granted because of the importance of the question presented and the likelihood that it will recur in the lower courts, with conflicting results, if this Court does not provide a definitive answer.

Conclusion

For the foregoing reasons, petitioners respectfully request that their petition for certiorari be granted.

By their attorneys,

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APPENDIX

United States Court of Appeals
For the First Circuit

No. 86-1058.

DONNA CROSSMAN, ET AL.,
PLAINTIFFS, APPELLANTS,

v.

MICHAEL MARCOCCIO, ET AL.,
DEFENDANTS, APPELLEES.

HEARD OCT. 8, 1986.
DECIDED DEC. 9, 1986.

Roy D. Simon, Jr., Washington University, St. Louis, Mo., with whom *Milton Stanzler*, *Jonathan L. Stanzler* and *Abedon, Michaelson, Stanzler & Biener*, Providence, R.I., were on brief for plaintiffs, appellants.

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Before
COFFIN, BREYER and TORRUELLA,
Circuit Judges.

COFFIN, Circuit Judge.

In this case we confront the novel question of whether prevailing civil rights plaintiffs must pay their opponents' costs and attorney's fees after refusing to accept a pretrial offer of judgment that exceeds the amount they ultimately recover at trial. The court below, relying upon Fed. R. Civ. P. 68, and *Marek* v. *Chesny*, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985), awarded defendants their taxable costs plus almost $11,000 in post-offer attorney's fees because plaintiffs ultimately recovered an amount less than defendants' offer of judgment. *Crossman* v. *Marcoccio*, 108 F.R.D. 433 (D.R.I. 1985). We affirm the district court's award of taxable costs, but reverse that portion of its order pertaining to post-offer attorney's fees.

I. Factual Setting.

The facts of this case are not in dispute. On August 7, 1984, appellants Donna and Daryl Crossman initiated a civil rights action pursuant to 42 U.S.C. §1983 on behalf of themselves and their two minor children against five Providence police officers, the chief of police, and the Providence Police Department.[1] On August 29, 1984, the named defendants answered the complaint and, in accordance with Fed. R. Civ. P. 68, simultaneously filed with the court an offer of judgment in the amount of $26,000, inclusive of all costs, interest, and attorney's fees accrued to that date. The Crossmans opted to refuse the settlement offer and proceed to trial.

Although the Crossmans later entered a stipulation dismissing the claims against the department and the chief of police, the case against the five individual officers, appellees here,

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[1] The complaint essentially alleged three categories of violations: false arrest, false imprisonment, and malicious prosecution.

was tried before a jury in district court. Following the trial, the court entered judgment in favor of the Crossmans and against all five officers in the total amount of $5,010, nearly $21,000 less than defendants' offer of judgment. Before judgment was entered, therefore, the officers filed a bill of costs pursuant to 28 U.S.C. §1920 and Rule 68. This bill included a request for $880.50 of post-offer taxable costs and $10,902.50 of post-offer attorney's fees. The district court, reasoning that defendants' post-offer attorney's fees should be characterized as "costs" under Rule 68, awarded defendants the full amounts set forth in their bill of costs. *Crossman*, 108 F.R.D. at 437.

The decision below raises two distinct issues on appeal. First, does Rule 68 compel appellants to pay appellees' post-offer costs? Second, if the first question is answered affirmatively, are appellees' post-offer attorney's fees part of the Rule 68 "costs" that become appellants' responsibility? We address each issue in turn.

II. Cost Shifting.

Rule 68, entitled "Offer of Judgment," provides in pertinent part:

> At any time more than 10 days before the trial begins, a party defending a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay *the costs incurred* after the making of the offer. . . .

Fed. R. Civ. P. 68 (emphasis supplied). This rule, designed to encourage the settlement of private disputes, has long been among the most enigmatic of the Federal Rules of Civil Procedure because it offers imprecise guidance regarding which post-offer costs become the responsibility of the plaintiff. Opinions differ sharply on the issue of whether Rule 68 compels plaintiffs to pay defendant's post-offer costs or simply

operates to deny prevailing plaintiffs recovery of their own post-offer costs. Because Fed. R. Civ. P.54(d) generally permits prevailing parties to recover their costs,[2] the question becomes whether Rule 68 *reverses* the operation of Rule 54(d), or merely *cancels* it. *See* Simon, *The Riddle of Rule 68*, 54 Geo. Wash. L. Rev. 1, 6 n.18 (1985). This is an issue of first impression in this circuit. *See Garrity* v. *Sununu*, 752 F.2d 727, 731 (1st Cir. 1984).

Appellants, relying solely on a footnote in Justice Stevens' opinion for the Court in *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 359 n.24, 101 S.Ct. 1146, 1153 n.24, 67 L.Ed.2d 287 (1981), contend that Rule 68 cancels the operation of Rule 54(d) and relieves the defendant from paying plaintiff's post-offer costs. To support this position, however, Justice Stevens offers only the ambiguous commentary contained in the treatise by Professors Wright and Miller, Moore's Federal Practice, and a 1939 Virginia Law Review article. *See Delta Air Lines*, 450 U.S. at 359, 101 S.Ct. at 1153 n.24. Even a cursory glance at these sources demonstrates that they are not dispositive of the issue. Indeed, others have interpreted these sources in an entirely different manner. *See, e.g., Marek*, 105 S.Ct. at 3023 & n.14 (Brennan, J., dissenting); *Delta Air Lines*, 450 U.S. at 374 & n.3, 101 S.Ct. at 1161 n.3 (Rehnquist, J., dissenting).

Our own analysis of the language and purpose of Rule 68, which parallels the analysis performed by most courts and commentators, persuades us that appellants' position lacks merit. First, the language of Rule 68 provides that "the offeree *must pay the costs incurred* after the making of an offer." Fed. R. Civ. P. 68 (emphasis supplied). There is no language in the Rule limiting the scope of the term "costs" to "the offeree's own costs." Furthermore, the Rule stresses that the offeree

[2] Rule 54(d) provides that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs;...."

must *pay* the costs incurred, thus suggesting an affirmative action. The draftees, had they meant to adopt the position urged by appellants, could easily have employed more passive language providing that the offeree "shall bear its own costs" or "shall not be entitled to recover costs under Rule 54(d)," but apparently they chose otherwise. As Justice Brennan has explained, appellants' interpretation of Rule 68 is not supported by the "*plain* language" of the Rule. *Marek*, 105 S.Ct. at 3023 (Brennan, J., dissenting) (emphasis in original).

The historical roots of Rule 68 also buttress our conclusion that appellants' interpretation of Rule 68 is incorrect. The original language of Rule 68 provided that a plaintiff who failed to obtain a judgment more favorable than the offer "shall not recover costs in the district court from the time of the offer *but shall pay costs from that time.*" *See* Fed. R. Civ. P. 68, *reprinted in* 1 F.R.D. LXIII, CXXXIV (1941) (emphasis supplied). When the rule took its present form in 1946, the drafters did not indicate an intent to change the cost-shifting mechanism of the original rule. Instead, as one commentator has perceptively noted, "the change was made for other reasons." Simon, *The Riddle of Rule 68*, 54 Geo. Wash. L. Rev. 1, 6 n.18 (1985) (citing advisory committee note accompanying the 1946 amendments to Rule 68). There is nothing in the genesis of Rule 68, therefore, to indicate that the language of the current rule should be interpreted in the limited fashion favored by the appellants.

Furthermore, the purpose animating Rule 68 also counsels in favor of adopting the broader interpretation of the rule urged by appellees. It is undisputed that the underlying purpose of Rule 68 is to encourage settlement of disputes and avoid protracted litigation. *Marek*, 105 S.Ct. at 3015; *Delta Air Lines*, 450 U.S. at 352, 101 S.Ct. at 1150. As the Supreme Court recognized in *Marek*, moreover, the rule is intended to prompt both parties "to evaluate the risks and costs of litigation, and to balance them against the likelihood of success

upon trial on the merits." *Marek*, 105 S.Ct. at 3015. If we were to interpret Rule 68 merely to deny plaintiffs their own post-offer costs, then there would be significantly less incentive for both sides to undertake a prudent assessment of the "risks and costs" of litigation. Reading Rule 68 to require the payment of defendants' post-offer costs by miscalculating plaintiffs enhances both defendants' incentive to extend Rule 68 offers of judgment and plaintiff-' incentive to accept such offers. As explained by the court in *Staffend* v. *Lake Central Airlines, Inc.*, 47 F.R.D. 218 (N.D. Ohio 1969), "[t]he provision in the rule which imposes costs upon a party who refuses an Offer of Judgment and who later recovers no more than the offer. . . puts teeth in the rule and makes it effective by encouraging acceptance." *Id.* at 219-20.

Finally, we note that, aside from Justice Stevens' footnote in *Delta Air Lines* and the district court opinion in *Marek*, 547 F.Supp. 542, 547-48 (N.D. Ill. 1982), every court addressing the issue thus far has held that Rule 68 obligates plaintiffs to pay defendants' post-offer costs after rejecting an offer more favorable than the judgment eventually obtained. In *Gay* v. *Waiters' and Dairy Lunchmen's Union, Local 30*, 86 F.R.D. 500 (N.D. Cal. 1980), for instance, the court held that a plaintiff who rejects an offer of judgment "assum[es] the risk that the outcome of the case will be less favorable than the offer, on pain of having to pay the costs subsequently incurred by the offeror." *Id.* at 502. Likewise in *Dual* v. *Cleland*, 79 F.R.D. 696 (D.D.C. 1978), the court proclaimed that, if the offer exceeds the judgment eventually obtained, "the defendant is entitled to charge the plaintiff with costs incurred after the offer of judgment." *Id.* at 697. In addition to the substantial list of court decisions adopting this view,[3] several commen-

[3] *Liberty Mutual Insurance Co.* v. *EEOC*, 691 F.2d 438, 442 (9th Cir. 1977); *Quintel Corp., N.V.* v. *Citibank, N.A.*, 606 F. Supp. 915 (S.D.N.Y. 1985); *Waters* v. *Heublein, Inc.*, 485 F. Supp. 110, 113 (N.D.Cal. 1979); *Mr. Hanger, Inc.* v. *Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607, 611 (E.D.N.Y. 1974).

tators have also expressed their belief that Rule 68 shifts post-offer costs to plaintiffs. *See, e.g.*, Branham, *Offers of Judgment and Rule 68: A Response to the Chief Justice*, 18 J. Marshall L. Rev. 341, 343, 357 (1985); Miller, *An Economic Analysis of Rule 68*, 15 J. Legal Stud. 93, 93 (1986); Simon, *The Riddle of Rule 68*, 54 Geo. Wash. L. Rev. 1, 6 n.18 (1985); Note, *The Impact of Proposed Rule 68 on Civil Rights Litigation*, 84 Colum. L. Rev. 719, 719-20 (1984); Note, *The Conflict Between Rule a68 nd the Civil Rights Attorney's Fees Statute: Reinterpreting the Rules Enabling Act*, 98 Harv. L. Rev. 828, 828 (1985).

Accordingly, in light of the language, purpose, and authoritative interpretations of Rule 68, we hold that a plaintiff who refuses an offer of judgment, and later fails to obtain a more favorable judgment, must pay the defendant's post-offer costs. The district court, therefore, correctly ruled that the Crossmans are responsible for all costs incurred by appellees after August 29, 1984. We now turn to the important question of whether appellees' post-offer attorney's fees are properly categorized as "costs" under Rule 68.

III. Attorney's Fees.

In *Marek* v. *Chesny*, 105 S.Ct. at 3012, the Supreme Court held that a prevailing civil rights plaintiff, who recovers an amount less than the defendant's Rule 68 offer of judgment, cannot recover his post-offer attorney's fees pursuant to 42 U.S.C. §1988. Essential to the Court's holding was its determination that the term "costs" in Rule 68 encompasses "all costs properly awardable under the relevant substantive statute or other authority." *Marek*, 105 S.Ct. at 3017. The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, permits a prevailing plaintiff to recover "a reasonable attorney's fee *as part of the costs*," so the Court ruled that "such fees are subject to the cost-shifting provision of Rule 68." *Marek*, 105 S.Ct. at 3017. The *Marek* Court, however, did not reach the precise issue before us today because the defendants

in that case failed to appeal the portion of the district court's order denying their request for post-offer attorney's fees. *Id.* at 3014 n.1.

Asserting that the instant case is no different from *Marek*, appellees have constructed their principal argument on appeal in the form of a deceptively simple syllogism:

(1) Rule 68 requires appellants to pay appellee's post-offer costs;

(2) Rule 68 costs, according to *Marek*, are determined by looking to section 1988, the underlying statute governing costs;

(3) Section 1988 permits the recovery of attorney's fees as part of costs;

(4) Rule 68, therefore, requires appellants to pay appellee's post-offer attorney's fees.

Although the logic of this syllogism is appealing,[4] the second and third steps of appellees' argument distort the law governing the relationship between Rule 68 and section 1988 by ignoring the two crucial words that serve to qualify the holding of the *Marek* case. *Marek* states that "the term 'costs' in Rule 68 was intended to refer to all costs *properly awardable* under the relevant substantive statute or other authority." *Marek*, 105 S.Ct. at 3017 (emphasis supplied). The Court stresses the importance of the two emphasized words by repeating them in the next sentence of the opinion: "In other words, all costs *properly awardable* in an action are to be considered within the scope of Rule 68 'costs.' " *Id.* (emphasis supplied). These two words—"properly awardable"—are so essential to the holding of *Marek* that, even if the Supreme Court had not expressly included them, we would have implied their existence to prevent *Marek's* chilling effect on the

[4] Indeed, Justice Brennan adopts such reasoning in an attempt to identify one of the many undesirable consequences flowing from the majority's "plain meaning" interpretation of Rule 68 and section 1988. *See Marek*, 105 S.Ct. at 3023-24 (Brennan, J., dissenting).

initiation of civil rights actions from attaining glacial magnitude. The pertinent inquiry, therefore, is whether appellees' attorney's fees are "properly awardable" under section 1988.

In *Marek*, plaintiff's attorney's fees were "properly awardable" as costs under section 1988 because his section 1983 action had been successful. *See* 42 U.S.C. §1988. Rule 68, however, prevented plaintiff from recouping the costs he incurred after his refusal to accept an offer of judgment that exceeded his ultimate recovery. Because the *Marek* Court determined that plaintiff's Rule 68 costs consisted of all costs "properly awardable" under section 1988, it held that Rule 68 also operated to bar the trial court from awarding plaintiff his section 1988 attorney's fees. *Marek*, 105 S.Ct. at 3018.

Nevertheless, applying the *Marek* analysis to the case at bar does not yield the result desired by appellees. Although *appellants*' attorney's fees were "properly awardable" costs under section 1988, *appellees*' attorneys fees were not. The statute awards costs only to a "prevailing party." Moreover, the standard set forth by the Supreme Court in *Hughes* v. *Rowe*, 449 U.S. 5, 14, 101 S.Ct. 173, 178, 66 L.Ed.2d 163 (1980) (per curiam), and *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978), provides that a civil rights defendant may not be awarded attorney's fees under section 1988 unless the trial court determines that the plaintiff's action was "frivolous, unreasonable, or without foundation." *Christiansburg*, 434 U.S. at 421, 98 S.Ct. at 700. In the instant case, there is absolutely no reason to believe that appellant's case was frivolous or meritless; indeed, appellants "prevailed" at trial. It follows from this that appellees' attorney's fees were not "properly awardable" costs as defined by section 1988 and, therefore, were not part of the costs shifted to plaintiff by the operation of Rule 68. To hold otherwise would fly in the face of the Supreme Court's carefully crafted decision in *Marek*,

a case that appellees agree must control our decision today. Accordingly, we conclude that the court erred by ordering the Crossmans to pay appellees' post-offer attorney's fees.

IV. Conclusion

For the reasons elaborated above, we first hold that Rule 68 compels prevailing plaintiffs to pay defendants' post-offer costs whenever the amount ultimately recovered at trial is less than the amount of a previously refused offer of judgment. Second, because courts may not properly award attorney's fees to unsuccessful civil rights defendants under section 1988, we hold that Rule 68 can never require prevailing civil rights plaintiffs to pay defendants' post-offer attorney's fees. Applying these dual holdings to the facts of the instant case, we affirm the decision below only to the extent that it requires the Crossmans to pay appellees' post-offer taxable costs in the amount of $880.50. We reverse that portion of the district court's order awarding appellees $10,902.50 in post-offer attorney's fees.

Affirmed in part, reversed in part.

No costs.

UNITED STATES DISTRICT COURT
D. RHODE ISLAND

CIV. A. NO. 84-0296.

DONNA CROSSMAN, et al.

v.

MICHAEL MARCOCCIO, et al.

Milton Stanzler, Providence, R.I., for plaintiffs.
Joseph F. Penza, Jr., Providence, R.I., for defendants.

OPINION

DEC. 20, 1985.
AS AMENDED DEC. 23, 1985.

FRANCIS J. BOYLE, Chief Judge.

Plaintiffs brought this action pursuant to 42 U.S.C. §1983 alleging that five Providence police officers had deprived them their constitutional rights. The action was tried in this court and a jury returned a verdict for Plaintiffs against all Defendants. Plaintiffs have asked the court tc assess costs pursuant to Federal Rule of Civil Procedure 54(d) and 28 U.S.C. §1920. Invoking Federal Rule of Civil Procedure 68, Defendants seek to assess Plaintiffs their costs and attorney's fees incurred after their Offer of Judgment. For the reasons detailed below, the Court (1) grants Plaintiffs their pre-Offer-of-Judgment costs, (2) grants Defendants their post-Offer-of-Judgment costs and (3) grants Defendants' post-Offer-of-Judgment attorney's fees.

Darryl Crossman, his wife Donna, and their two children, Krista and Ian, filed this action against police officers Michael Marcoccio, Robert McDonald, Timothy O'Brien, Leonard Wahl and Dennis Lambert on August 7, 1984. Plaintiffs alleged that Defendants had entered their home without probable cause on October 16, 1982, had assaulted Donna and Darryl Crossman, falsely arrested them and imprisoned them,

and had maliciously prosecuted them, all in violation of their constitutional rights. Defendants answered the complaint on August 29, 1984, denying Plaintiffs allegations and counterclaiming for damages due to an alleged assault by Donna and Darryl Crossman on Defendants.

Twenty-two days after the action was begun, on August 29, 1984, Defendants submitted an Offer of Judgment. Defendants offered to have judgment enter against them in the amount of $26,000, including costs, interest and attorney's fees accrued as of that date. Plaintiffs rejected the offer. The action proceeded to trial. A jury returned a verdict of $5,010 for Plaintiffs. The jury awarded each of the two adult Plaintiffs $500 each against each of the five Defendants and each of the two minor Plaintiffs one dollar each against each of the five Defendants. The jury found that Plaintiffs Donna and Darryl Crossman did not assault Defendants.

On October 11, 1985, Defendants submitted a Bill of Costs totalling $11,783. This total included a requested award of $10,902.50 for post-Offer-of-Judgment attorney's fees. Plaintiffs filed a memorandum opposing Defendants' Bill of Costs. On October 30, 1985, Plaintiffs filed their Bill of Costs, requesting an assessment of $732.40 against Defendants, to which Defendants have objected.

I. PLAINTIFFS' COSTS

The first issue presented the Court is whether Plaintiffs may recover some or all of their costs from Defendants. As a general rule, a prevailing party to a lawsuit is entitled to have its opponent pay its costs unless a court directs otherwise. Fed. R. Civ. P.54(d). Costs properly taxable to a losing party include clerk, court reporter, and witness fees, docket costs and copying costs. 28 U.S.C. §1920. Federal Rule of Civil Procedure 68, however, provides in part:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken

> against him for the money or property or to the effect specified in his offer with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn... If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

It is well settled that under Rule 68, a prevailing plaintiff may not recover his post-Offer-of-Judgment costs from a defendant if the final judgment plaintiff receives is less than defendant's Offer of Judgment. *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 352 & n.9, 101 S.Ct. 1146, 1150 & n.9, 67 L.Ed.2d 287 (1981); *Chesny* v. *Marek*, 720 F.2d 474, 478 (7th Cir. 1983), *rev'd on other grounds*, 105 S.Ct. 3012 (1985).

Applying these principles, Plaintiffs in this action may recover from Defendants their pre-Offer-of-Judgment costs.[1] These include their filing and service of process fees of $60 and $49 respectively, and court reporter fees totalling $394.40 incurred on April 11, 1983 and June 5, 1983.[2] Because Plaintiffs' verdict of $5,010 was less than Defendants' $26,000 Offer of Judgment, Plaintiffs may not recover their post-offer costs. Plaintiffs may not recover witness fees totalling $229 incurred on September 20, 1985 and September 24, 1985.

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[1] No issue is presented the Court regarding the validity of Defendants' Offer of Judgment. An Offer of Judgment is generally proper if it does not exclude costs and attorney's fees. *Marek* v. *Chesny*, 105 S.Ct. 3012, 3015-16 (1985). Defendants' offer expressly included costs and attorney's fees.

[2] These transcripts were of hearings before a hearing officer appointed to hear Plaintiffs' complaint to the Police Department of the City of Providence. The transcripts were referred to extensively in the course of this trial.

II. DEFENDANTS' COSTS

The next issue presented is whether Defendants are entitled an award of costs. Defendants assert that by operation of Rule 68, they are entitled to have Plaintiffs pay the costs Defendants incurred after their Offer of Judgment. Plaintiffs maintain that Rule 68 operates only to deny Plaintiffs recovery of their post offer costs.

Where a plaintiff refuses an Offer of Judgment and subsequently recovers less than the amount offered, not only is plaintiff denied recovery of his post-offer costs, but plaintiff must pay the costs incurred by the defendant after defendant's Offer of Judgment. *Liberty Mutual Ins. Co.* v. *EEOC*, 691 F.2d 438, 442 (9th Cir. 1982); *Waters* v. *Heublein, Inc.*, 485 F. Supp. 110, 113, 117 (N.D. Cal. 1979); *Mr. Hanger, Inc.* v. *Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607, 610-11 (E.D.N.Y. 1974). In *Mr. Hanger, Inc.* v. *Cut Rate Plastic Hangers, Inc.*, *supra*, the court explained the rationale of shifting a defendant's costs to a plaintiff under Rule 68. In that case, defendants moved to compel plaintiff to pay the costs incurred by them in defending plaintiff's patent infringement suit. Defendant had made an Offer of Judgment, plaintiff had refused it, and plaintiff was then unsuccessful at trial. The court assessed defendant's costs against the plaintiff. *Mr. Hanger, Inc.*, *supra*, at 611. It reasoned that the purpose of Rule 68 is to induce settlement. *Mr. Hanger, Inc.*, *supra*, at 610; *accord Marek* v. *Chesny*, 105 S.Ct. 3012, 3014-15 (1985). Shifting all costs to an offeree who refuses to settle " 'puts teeth in the rule and makes it effective by encouraging acceptance.' " *Mr. Hanger, Inc.*, *supra*, at 610 (quoting *Staffend* v. *Lake Central Airlines, Inc.*, 47 F.R.D. 218, 219-20 (N.D. Ohio 1969)).

Plaintiffs asserts that the Supreme Court has suggested a contrary interpretation of Rule 68. Justice Stevens in *Delta Air Lines, Inc.* v. *August*, *supra*, did imply that Rule 68 operates to deny costs to a prevailing plaintiff and not to impose defen-

dant's costs upon plaintiff. *Delta Air Lines, Inc., supra*, 450 U.S. at 359 n.24, 101 S.Ct. at 1153 n.24 (1981) (interpreting 12 C. Wright & A. Miller, Federal Practice and Procedure §3001, p. 56 (1973)). Justice Stevens was addressing the particular situation in which defendant and not plaintiff succeeded at trial and indeed, the holding in *Delta Air Lines, Inc.* was that a successful defendant could not avail itself of Rule 68. *See Delta Air Lines, Inc., supra*, 450 U.S. at 352, 360 n.27, 101 S.Ct. at 1150, 1154 n.27; *Delta Air Lines, Inc., supra*, at 362, 101 S.Ct. at 1155 (Powell, J., concurring).[3] Other Justices have read Rule 68 to impose defendant's costs upon a plaintiff. *See Marek* v. *Chesny*, 105 S.Ct. 3012, 3025 n.14 (1985) (Brennan, J., dissenting); *see also Delta Air Lines, Inc., supra*, 450 U.S. at 374 n.3, 101 S.Ct. at 1161 n.3 (Rehnquist, J., dissenting) (taking issue with Justice Stevens' interpretation of Wright & Miller treatise). In addition, the state statutes after which Rule 68 was modeled expressly provided that a party who refused an Offer of Judgment must pay the post-offer costs of the offeror. *See id. Delta Air Lines, Inc., supra*, 450 U.S. at 372-73 & n.2, 101 S.Ct. at 1160-61 & n.2 (Rehnquist, J., dissenting).

Because the overwhelming weight of authority supports the imposition of a defendant's costs on a plaintiff who rejects an Offer of Judgment and then recovers a less favorable judgment at trial, the Court imposes Defendant's post-offer costs upon Plaintiffs. Plaintiffs are assessed Defendants' copying costs of $37.12, witness fees of $775.18, costs incident to taking depositions of $43.20 and subpoena costs of $25.

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[3] Despite Justice Stevens' broad language, Justice Powell in the same opinion suggested that the court's holding meant unsuccessful defendants could recover costs but successful defendants could not. *Delta Air Lines, Inc., supra*, 450 U.S. at 362, 101 S.Ct. at 1155 (Powell, J., concurring).

III. DEFENDANTS' ATTORNEYS FEES

The final issue the court must decide is whether Rule 68 "costs" include Defendants' post-offer attorney's fees. Defendants assert that if they can recover their post-Offer-of-Judgment costs under Rule 68, they may also recover their post-offer attorney's fees in light of the recent Supreme Court holding in *Marek* v. *Chesny*, *supra*, that Rule 68 costs include attorney's fees. Indeed, a strict application of *Marek* requires this result.

In *Marek*, plaintiff had rejected defendants' Offer of Judgment and had recovered a less favorable judgment at trial. The issue presented the Supreme Court was whether Rule 68 barred plaintiff's recovery of its post-offer attorney fees under 42 U.S.C. §1988. The Supreme Court held that the term "costs" as used in Rule 68 encompassed attorney's fees, and the Court therefore denied plaintiff recovery of fees. *Marek*, *supra*, 105 S.Ct. at 3018. The *Marek* Court reasoned that the most reasonable inference to be drawn from Congress' failure to define "costs" in Rule 68 was that "Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority." *Marek*, *supra*, 105 S.Ct. at 3017. Because §1988 allows the recovery of attorney's fees as costs, the Court reasoned that Rule 68 must include attorney's fees in the context of §1988. *See Marek*, *supra*, 105 S.Ct. at 3016-17.

The *Marek* holding contains no limiting language. Quite simply, the Supreme Court has stated that "where the underlying statute defines 'costs' to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68." *Marek*, *supra*, 105 S.Ct. at 3017. Because Rule 68 requires a prevailing plaintiff to pay defendant's post-Offer-of-Judgment costs where plaintiffs judgment does not exceed defendant's Offer of Judgment, *supra* Part II, a prevailing plaintiff under these circumstances must pay defendant's post-offer attorney's fees.

Plaintiffs argue that the Rule 68 interpretation Defendants seek would truly be inconsistent with §1988. Under §1988, a prevailing defendant may recover attorney fees only if a plaintiff's claim was frivolous, unreasonable or without foundation. *Hughes* v. *Rowe*, 449 U.S. 5, 14-15, 101 S.Ct. 173, 178, 66 L.Ed.2d 163 (1980). Plaintiffs argue that under the application of Rule 68 sought by Defendants, Defendants would recover fees from plaintiffs who won a verdict, and therefore do not assert a frivolous claim. In his dissent in *Marek*, Justice Brennan expressed the same concerns. *See Marek*, *supra*, 105 S.Ct. at 3023-24 (Brennan, J., dissenting); *see also Delta Air Lines, Inc.*, *supra*, 450 U.S. at 366 n.5, 101 S.Ct. at 1157 n.5 (Powell, J., concurring). Justice Brennan raised these concerns, however, only after making it clear that the logical extension of the Court's denying plaintiff's fees under Rule 68 is to require plaintiffs to pay defendants' fees under the rule. *Marek*, *supra*, 105 S.Ct. at 3023 (Brennan, J., dissenting). Moreover, the *Marek* majority addressed the argument that the Rule 68 interpretation it adopted was inconsistent with 42 U.S.C. §1988 and rejected it. *See Marek*, *supra*, 105 S.Ct. at 3017-18.

This result may be viewed as having a "chilling" effect on actions brought under 42 U.S.C. §1983. *See Chesny* v. *Marek*, 720 F.2d 474, 478-480 (7th Cir. 1984). The majority of the Supreme Court in reversing the Seventh Circuit Court of Appeals in *Marek*, *supra*, did not give weight to this argument. The Supreme Court stated at 105 S.Ct. 3017-18:

> Merely subjecting civil rights plaintiffs to the settlement provisions of Rule 68 does not curtail their access to the courts, or significantly deter them from bringing suit, . . . there is no evidence, however, that Congress, in considering §1988, had any thought that civil rights claims were to be on any different footing from other civil claims insofar as settlement is concerned.

The circumstances are that Defendants made a substantial Offer of Judgment in the amount of $26,000, which Plaintiffs deliberately spurned. Rule 68 is intended to encourage good faith efforts to resolve disputes before trial. If all that is at risk from plaintiffs' point of view is an assessment of costs, exclusive of counsel fees, plaintiffs can afford a less than serious consideration of the Offer of Judgment and defendants have little, or next to nothing to gain from making such offers. The effect of awarding counsel fees to defendants will encourage defendants to make serious offers and encourage plaintiffs to give serious consideration to such offers. Although the Court has the benefit of having heard all the evidence and the jury verdict, on the basis of the information available to Plaintiffs at the time of the Offer of Judgment, the rejection of the offer must be said to have been more the action of a "river boat gambler" than an objective evaluation of the possibilities. If anything, the offer was generous, and its rejection whimsical. There is no purpose to protect plaintiffs in actions brought under 42 U.S.C. § 1983 from the effects of tactical choices or to deny to defendants the benefits of earnest efforts to resolve such controversies.

For these reasons, the Court rules that *Marek* v. *Chesny* governs this action and holds that Defendants may recover attorney's fees from Plaintiffs under Rule 68. While the only other courts to consider whether a defendant may recover its attorney's fees from a plaintiff under Rule 68 have held differently, *see Bitsouni* v. *Sheraton Hartford Corp.*, 52 U.S.L.W. 2354 (D. Conn. Nov. 23, 1983); *Waters* v. *Heublein, Inc.*, *supra*, at 117, those other courts addressed this issue before the Supreme Court decided *Marek*.

IV. CONCLUSION

In sum, under Rule 54(d) and 28 U.S.C. §1920 the court awards Plaintiffs its costs incurred before Defendants' Offer of Judgment, but not those incurred after. Plaintiffs are entitled to $503.40 in costs. The Court awards Defendants its post-Offer-of-Judgment costs totalling $880.50 pursuant to Rule 68. The Court also awards Defendants their post-Offer-of-Judgment attorney fees totalling $10,902.50 as part of Rule 68 costs.

SO ORDERED.

United States Court of Appeals
For the First Circuit

No. 86-1058

DONNA CROSSMAN, ET AL.,
PLAINTIFFS, APPELLANTS,

v.

MICHAEL MARCOCCIO, ET AL.,
DEFENDANTS, APPELLEES.

JUDGMENT
ENTERED DECEMBER 9, 1986

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

The judgment of the district court is affirmed in part and reversed in part in accordance with the opinion issued this day.

No costs.

By the Court:
FRANCIS P. SCIGLIANO, *Clerk.*

BY (ILLEGIBLE),
Chief Deputy Clerk.

[cc: Messrs: Simon, Penza, Crump and Ms. Labinger]

Supreme Court, U.S.
FILED
APR 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1455

In the Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL MARCOCCIO, et al.,
PETITIONERS,

v.

DONNA CROSSMAN, et al.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' RESPONSE TO PETITION FOR CERTIORARI

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Questions Presented

Respondents accept Petitioners' statement in regard hereto.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1455

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Opinions Below

Respondents accept Petitioners' statement in regard hereto.

Jurisdiction

Respondents accept Petitioners' statement in regard hereto.

Statutes and Rules Involved

Respondents accept Petitioners' statement in regard hereto.

Statement of the Case

On or about June 8, 1984, Plaintiffs/Respondents Daryl and Donna Crossman, on behalf of themselves and their two minor children, Ian and Krista, filed suit against five individual police officers of the Providence Police Department, the department itself and the chief of the department, pursuant to the provisions of 42 U.S.C. Section 1983. On August 29th, 1984, Defendants filed an answer with the court and, in addition, submitted to Plaintiffs an Offer of Judgment in the amount of $26,000.00, inclusive of all costs, interest and attorneys' fees that had accrued up to that date. The Offer was submitted on behalf of all Defendants, including the City of Providence and the chief. Plaintiffs did not accept the offer. Discovery had not commenced. Shortly before trial, Plaintiffs entered into a stipulation dismissing the claims against the City and the chief. Trial then began before Chief Judge Francis J. Boyle in the United States District Court for the District of Rhode Island. Judgment was entered for the Plaintiffs against each of the five individual police officers; the total judgment was $5,010.00, almost $21,000.00 less than that offered by Defendants in the Offer. Plaintiffs also prevailed on the police officers' counterclaims for assault.

Before judgment was entered, Petitioners filed with the District Court a Bill of Costs, pursuant to the provisions of 28 U.S.C. Section 1920, which delineates those items which may be taxed, and pursuant to the provisions of F.R.Civ.P. 68. As part of their Bill, Petitioners requested the sum of $10,902.50 in attorneys' fees to be taxed as part of the costs. Respondents duly objected thereto.

The District Court heard oral argument by the parties on October 28, 1985. Respondents strenuously objected to the inclusion of attorneys' fees as part of Defendants' costs, arguing that such inclusion would contravene existing statutory and case law, and violate public policy as established by Congress. *Marek* v. *Chesny*, 473 U.S. 1 (1985), 105 S.Ct. 3012, 87

L.Ed.2d 1, it was argued, precludes Plaintiffs from recovering their own attorneys' fees pursuant to 42 U.S.C. Section 1988. The Crossmans argued that *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) governed this case, as their claim was not frivolous because the Crossmans prevailed on the merits.

The District Court entered an order awarding Petitioners their Post-Offer of Judgment costs; included therein is an award of attorneys' fees as part of the costs. In its opinion the Court held that this action was governed by the decision of the Supreme Court in *Marek* v. *Chesny*, *supra*, and that, in accordance with that decision, Defendants/Petitioners are entitled to attorneys' fees. *Crossman* v. *Marcoccio*, 108 F.R.D. 437 (D.R.I. 1985). The Court awarded Defendants' Post-Offer of Judgment costs totalling $880.50 and awarded Post-Offer Attorneys' Fees totalling $10,902.50, the exact amount requested by Defendants. The District Court took no evidence as to the Respondents' ability to pay those costs.

The United States Court of Appeals for the First Circuit reversed the decision and award of the District Court with respect to attorneys' fees. It held that the trial court's award of attorneys' fees was inconsistent with the law as enunciated by *Marek*. Such an award was not "properly awardable" in this case because Petitioners were not prevailing parties. According to the First Circuit, the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988, permits an award of attorneys' fees, as part of the costs, to a prevailing party; as Petitioners were not prevailing parties, such an award was not "properly awardable" under *Marek*. *Crossman* v. *Marcoccio*, 806 F.2d 329, 334 (1st Cir. 1986). Therefore, attorneys' fees are not subject to the cost shifting provisions of F.R.Civ.P. 68 *Id.* "To hold otherwise", the First Circuit held, "would fly in the face of the Supreme Court's carefully crafted decision in *Marek*, a case that . . . must control our decision today." *Id.*

Reasons Why the Petition Should Be Denied

I. The Decision of the Court of Appeals Is the Correct Application of This Court's Decision in *Marek*.

In *Marek* v. *Chesny*, *supra*, this Court held that a prevailing civil rights plaintiff, who recovers an amount at trial less than that contained in an offer of judgment under Rule 68, may not recover attorneys' fees under 42 U.S.C. Section 1988. It held that the word "costs", as given in the last line of Rule 68, encompasses "all costs properly awardable under the relevant substantive statute or other authority". *Marek*, 105 S.Ct. at 3017. Section 1988 defines attorneys' fees "as part of the costs", so this Court ruled in *Marek* that the terms of Rule 68 mandatorily preclude an award of attorneys' fees to the plaintiff.

In its ruling in the case at bar, the Court of Appeals took note of two key words, that is, the words "properly awardable", noting that this Court also stressed their importance. *Crossman* v. *Marcoccio*, 806 F.2d 329, 333 (1st Cir. 1986). The Court of Appeals said, that, even had they not been stated, the appellate court would have implied their existence. *Id.* The "pertinent inquiry", the lower court said, is whether the attorneys' fees awarded to petitioners were "properly awardable" under Section 1988. *Id.*

The Court of Appeals set forth two reasons as to why the District Court's attorneys' fees awards were not properly awardable. First, Section 1988 awards fees to a *prevailing party*, which, it is clear beyond all questioning, Petitioners were not. *Id.* at 334. Petitioners were unsuccessful Defendants in this case—not successful Plaintiffs, as they were in *Marek*. Therefore, Section 1988 is inapplicable. Secondly, this Court has already held that a Defendant may not recover attorneys' fees from a plaintiff unless he meets the standards set forth in *Hughes* v. *Rowe*, 449 U.S. 5, 14, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980) (per curiam) and *Christiansburg Garment Co.* v.

EEOC, 434 U.S. 412, 421 (1978), that is, unless plaintiff's civil rights action was "frivolous, unreasonable, or without foundation". *Christiansburg*, 434 U.S. at 421. As the Court of Appeals correctly stated, "[i]n the instant case, there is absolutely no reason to believe that [respondents'] case was frivolous or meritless; indeed, [respondents] 'prevailed' at trial". *Crossman*, 806 F.2d at 334.

The Court of Appeals' decision in the case at bar is not inconsistent with *Marek*. It is, instead, a logical application of *Marek*. *Marek* clearly holds that Rule 68 encompasses all costs "properly awardable" under the relevant substantive statute; it is clear that Section 1988 awards attorneys' fees only to prevailing parties, and it is equally beyond question that Petitioners are not a prevailing party. Hence, under the relevant statute, Section 1988, attorneys' fees are not awardable to Petitioners. Nor was Respondents' cause of action frivolous, unreasonable or without foundation, considering the jury's verdict in favor of Respondents. Accordingly, this is not an issue of an important question of federal law; this is a case in which a lower court has correctly applied a rule of law already handed down by this Court. As this case does not present a question of sufficient importance, this Court should reject the Petition for Certiorari. There is no conflict with any other Circuit Court on this issue.

The only two cases that have yet been published on the question presented are in agreement as to the outcome. *See*, *Crossman*, 806 F.2d at 333-34; *Adams* v. *Wolff*, 110 F.R.D. at 293-94. Accordingly, this Court should deny the Petition for Certiorari at this time.

Conclusion

For the reasons as stated in the foregoing argument, this Court should deny the Petition for Certiorari in the case at bar.

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